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In the Supreme Court of the United States

OCTOBER TERM 1941.

No. 126.

FIXLER BROS., INC.,
a Corporation,
Petitioner,

vs.

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD, CONNECTICUT,
a Corporation,
Respondent.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S BRIEF.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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In this reply brief the outline of Respondent's brief will be followed and the questions discussed in that order.

THE CASE.

Two misstatements of facts contained in Respondent's brief under this subject require correction.

The judgment in the Chicago Court was not a default judgment. Counsel for the Gregg Carloading & Distributing Company entered appearance in the pending lawsuit and was present in court when judgment was entered in favor of the petitioner. Respondent had notice of the claim and the pending lawsuit, but elected, as it had the right to do, not to defend its insured. (R. p. 3.)

The parking lot was open only in the respect that it was not under cover, it being surrounded by high buildings and fences with two gates. (R. p. 15.)

ARGUMENT.

I.

THE LANGUAGE OF THE INSURANCE POLICY IS SUSCEPTIBLE OF MORE THAN ONE INTERPRETATION.

In reply to Respondent's contention on pages 3 and 4 of its brief, that the language of the insurance policy is susceptible of but one meaning, the attention of the Court is called to the fact that the language "be left unattended" contained in Paragraph 9 of the insurance policy is the language in question,—more specifically the word "unattended." The degree or nature of attendance was not defined by the Respondent insurance company. It did not specify, as it did in *Ries & Sons, Inc., v. Automobile Insurance Company,* 121 N. J. L., 493, 3 Atl. 2d, 610, that attendants must be agents of the insured. It did not eliminate other attendants such as attendants at parking lots who certainly attend vehicles left in their custody. It merely stated that the tractor and trailer combination should not "be left unattended." Could it be said then that if attendants at a fenced-in parking lot were at all times present, as was admitted, this would not be a sufficient compliance with the requirements of the policy,—that the tractor and trailer combination should not be left unattended? The District Court which had before it all of the evidence and heard the testimony of the only witness found that the tractor and trailer combination was not left unattended. In view of these admitted facts and in view of the District Court's findings, it is readily apparent how far the Circuit Court of Appeals went afield in construing the language of the contract when it found that,—"at least one of the two men in whose custody the combination outfit hauling the cargo was placed should remain during its transit with the cargo." No such language was in this contract. The Circuit Court of Appeals in effect wrote into the insurance policy provisions favoring the insurance company even beyond the claims of Respondent.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE LAW OF OHIO.

With respect to the argument of Respondent that the decision of the Circuit Court of Appeals is not in conflict with the law of Ohio, an examination of the cases cited by Respondent indicate no variance from the established Ohio rule, that insurance contracts are no exception to the rules governing the construction and interpretation of other contracts, namely, that an ambiguous contract prepared by one party alone will be construed most strongly against the party preparing it. To quote again from *Fidelity & Deposit Company of Maryland v. Friedlander,* 101 Federal 2d, 106:

> "Where in an insurance policy a term is open to two or more constructions we are required to adopt that one most favorable to the insured * * *. This is a just rule, because insurance policies are written by the insurers."

CONCLUSION.

We submit, therefore, that the writ of certiorari ought to be granted, because the Circuit Court of Appeals departed from the established law of Ohio and its own decisions and, without any basis in fact, construed language of an insurance policy in favor of the insurer instead of the party for whose benefit it was written.

Respectfully submitted,

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SUPPLEMENT TO BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S BRIEF.

1. RESPECTING—(a) "THE TRACTOR AND TRAILER COMBINATION WAS LEFT UNATTENDED."

Respondent, on page 3 of its Brief, contends that our statement that the uncontradicted testimony was that attendants were at all times present while the tractor and trailer were in the parking lot was erroneous. The excerpt from the opinion of the Circuit Court of Appeals quoted by respondent as support for its contention possibly gives, at first sight, a slightly contrary impression, but insofar as it does, it is what is erroneous, not our statement,—which merely paraphrases the following finding of fact by the trial court, based upon a stipulation of counsel on this point, as well as upon the uncontradicted evidence:

> "With respect to the second issue of fact, stipulations of counsel and the uncontradicted testimony of witness Hanson indicate that when assured's agent drove the truck and cargo into the parking lot and ceased to attend it, he left it in charge of the day and

night attendants at the parking lot * * *. The Court, therefore, is of the opinion that the truck and cargo was not left unattended." (R. p. 8.)

There were two attendants there when the driver arrived in the evening, and there were two attendants there when he returned the next morning. (R. p. 16.)

The Circuit Court of Appeals apparently preferred to rely upon a haphazard answer of the witness at the end of the cross examination, when counsel interjected into the case for the first time the color of a night attendant:

"Q. And this night attendant that you told us about was a colored lad?

A. A colored fellow." (R. p. 18.)

The witness was not talking about the night of the theft at all, but rather about some other night when he had arrived later and had then seen a colored man.

(b) "WHILE IN TRANSIT."

It should not be overlooked that the tractor and trailer combination was to return to the loading dock of the carrier the next morning for the completion of loading, before beginning its journey to Cleveland and Chicago. It was not, therefore, "in transportation between points of shipment and destination," and the requirement of clause eight of the policy that it be in the custody of two men was not applicable,—as specifically found by the District Court. (R. p. 8.)

Since the two-man requirement had not yet become applicable, the reasoning of the Court of Appeals that the obvious purpose of clause nine was to require that at least one of the same two men should *remain* during transit is hardly logical. When paragraph eight falls because inapplicable, any dependence of paragraph nine upon it likewise falls, unless specifically excepted.

2. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT ONLY IN CONFLICT WITH THE LAW OF OHIO, BUT ALSO WITH THE DECISIONS OF THE SUPREME COURT AND OF THE SIXTH CIRCUIT COURT OF APPEALS ITSELF.

Ohio cases cited in Respondent's Brief rather tend to confirm and strengthen our position. *National Life & Accident Insurance Company v. Ray,* 117 O. S. 13, 158 N. E. 179, is cited to the point that insurance contracts are to be enforced as written. We have asked nothing more; we are protesting that the Circuit Court of Appeals did not do that, but instead wrote into clause nine of the policy an additional requirement.

Another of Respondent's cases (*Burns v. Employers' Liability Assurance Corp.,* 134 O. S. 222) goes even further than our own citations, when it says: "Undoubtedly the assured is entitled to a liberal construction," which we have not requested here.

Respondent makes no comment on the governing decisions of the Sixth Circuit Court of Appeals itself, referred to on page 13 of our Brief. It would not be a simple matter to argue away their force and authority. For that court, in *Fidelity and Deposit Company of Maryland v. Friedlander,* 101 F. (2d) 106, went so far as to hold that an employee of an independent contractor, Ed Foley, was an employee of the Assured, Friedlander, within the meaning of a paragraph in a robbery insurance policy requiring the presence in the jewelry store of a custodian and "one other employee of the Assured."

In this case, the importance of which in establishing a conflict it would be difficult to overestimate, the insurance policies provided coverage as follows:

> "Section (f). On property specified in Item 8, from within the premises, while a custodian and at least *one other employee of the Assured are on duty therein.*"
>
> "There will be *one or more employees* (state number) or members or officers of the firm *on duty inside*

the premises in addition to the custodian at all times this policy is in force."

Friedlander, the Assured, operated a small jewelry store where a robbery occurred early in the morning of October 5, 1935. Only the manager of the store was on the premises, being engaged in putting diamonds in the show window when there arrived a man named Peterson, employed by Foley, operator of a window cleaning company. The manager reached over and unlocked the door to permit Peterson to enter. While Peterson was in the act of closing the door, the robbers entered.

The only question to be decided was, was Peterson an employee of Friedlander within the meaning of the quoted policy provisions? Friedlander had, a few months previously, entered into a contract with Foley by which the latter agreed for a compensation of $7 per month to supply the jewelry store with window cleaning and certain other janitor service, which was performed each morning prior to the opening of the store for business. Friedlander had nothing to do with the selection of the employee of Foley who was to do the work, and had no right of direction or control in the manner, means or details of how the work was to be done. Foley paid Peterson's salary and he alone had the right to discharge him. Neither Foley nor Peterson had a key to the store. By all ordinary tests, Peterson was of course not an employee of Friedlander, the Assured.

Yet the Sixth Circuit Court of Appeals held that in the sense of the quoted provisions of the policies Peterson was an employee of Friedlander. To imagine a greater and more direct conflict between this decision and the one in the case at bar would be impossible.

For in the *Friedlander* case, the Court holds that an undoubted employee of another may be considered an "employee of the Assured," while in our case it holds that "attended," without further definition, or requirement, can only be satisfied or complied with by *an employee of the*

carrier,—or, more specifically, by one of the two men provided for in another paragraph to have custody of the tractor and trailer combination *when cargo is in transportation* between points of shipment and destination,—"rolling along the road" as the District Judge characterized it,—a paragraph and provision obviously inapplicable here since the transportation had not yet begun, as the District Court found.

Respectfully submitted,

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